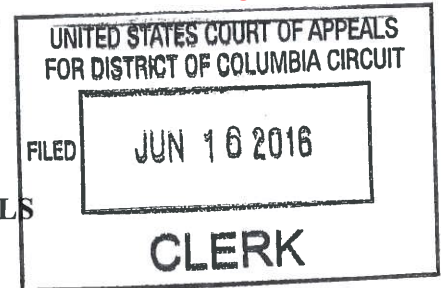


UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

JUN 16 2016

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA



RECEIVED

THE MIRAGE CASINO-HOTEL,
d/b/a THE MIRAGE

Petitioner,

and

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

PETITION FOR REVIEW

16-1192

Pursuant to Section 10(f) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. Section 160(f) and Rule 15 of the Federal Rules of Appellate Procedure, The Mirage Casino-Hotel, d/b/a The Mirage petitions the Court to review and set aside the Decision and Order of the National Labor Relations Board in *Mirage Resorts, Incorporated d/b/a The Mirage and International Union of Operating Engineers Local 501, AFL-CIO* (Case No. 28-CA-170874) entered on May 23, 2016. A copy of the Decision and Order is attached as Exhibit "A."

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ORIGINAL

WHEREFORE, the Employer prays that its Petition for Review of the Board's Decision and Order be granted; that upon such review the Board's Decision and Order be set aside and denied enforcement; and that the Employer be granted such other and further relief as the Court deems appropriate.

Dated this 16th day of June, 2016.

Respectfully submitted,
JACKSON LEWIS P.C.


for s/ Paul T. Trimmer

Gary C. Moss

Paul T. Trimmer

3800 Howard Hughes Parkway

Suite 600

Las Vegas, Nevada 89169

Tele: (702) 921-2460

Fax: (702) 921-2461

Email: moss@jacksonlewis.com

trimmerp@jacksonlewis.com

CERTIFICATE OF SERVICE

In addition to filing this **Petition for Review** in the above captioned matter via hand delivery to the court, we hereby certify that copies have been served this 16th day of June, 2016, by First Class Mail, upon:

Mr. Gary Shinnars
Office of Executive Secretary
National Labor Relations Board
1099 – 14th Street, N.W.
Washington, D.C. 20570-0001

Nathan Higley
Counsel for the General Counsel
via e-mail to Nathan.Higley@nlrb.gov

International Union of Operating
Engineers Local 501, AFL-CIO
301 Deauville Street
Las Vegas, Nevada 89106



/s/ Emily Santiago
An Employee of Jackson Lewis P.C.

EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

The Mirage Casino-Hotel d/b/a The Mirage and International Union of Operating Engineers Local 501, AFL-CIO. Case 28-CA-170874

May 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 1, 2016, by International Union of Operating Engineers Local 501, AFL-CIO (the Union), the General Counsel issued the complaint on March 21, 2016, alleging that The Mirage Casino-Hotel d/b/a The Mirage¹ (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 28-RC-154083. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and asserting affirmative defenses.

On April 5, 2016, the General Counsel filed a Motion for Summary Judgment. On April 6, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its contentions, raised and rejected in the underlying representation proceeding, that (1) the Union's representation petition was invalid because it did not comply with Section 102.61(a)(8) of the Board's Rules and Regulations, (2) the unit is inappropriate because the surveil-

lance technicians are guards within the meaning of Section 9(b)(3) of the Act and the Union represents non-guard employees of the Respondent, and (3) the unit is inappropriate because the surveillance technicians are confidential employees.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation company with an office and place of business in Las Vegas, Nevada (the Respondent's facility) and has been engaged in operating a hotel and casino providing food, lodging, gaming, and entertainment.

During the 12-month period ending March 1, 2016, the Respondent, in conducting its operations described above, purchased and received at the Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of Nevada and derived gross revenues in excess of \$500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on July 7, 2015, the Union was certified on October 28, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

² The Respondent raises as an affirmative defense the assertion that the Board's November 18, 2015 Order in Case 28-RC-154083 did not rule on the Respondent's contention that the surveillance technicians are confidential employees. However, the Board's November 18, 2015 Order denied the Respondent's request for review of the Regional Director's Decision and Direction of Election because it raised no substantial issues warranting review, thereby affirming the Regional Director's finding that the Respondent failed to meet its burden of proof to establish that the surveillance technicians are confidential employees.

¹ We grant the General Counsel's unopposed motion to amend the pleadings to reflect the Respondent's correct name, and we have modified the case caption accordingly. Therefore, the Respondent's contentions—that the complaint should be dismissed and the motion for summary judgment should be denied because the entity named in those documents does not employ the unit employees—are moot.

All full-time and regular part-time surveillance techs at the Employer's facility; excluding all other employees, including office, clerical, professional, guards, and supervisors as defined in the National Labor Relations Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

At all material times, Rick Jost held the position of vice president of human resources and has been a supervisor of the Respondent within the meaning of Section 2(11) and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times, the senior associate general counsel labor & employment of MGM Resorts International held the position of legal counsel of the Respondent and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

On December 18, 2015 and February 26, 2016, the Union, by letters, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit.

Since about January 12, 2016, the Respondent, by letter, has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about January 12, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry*

Co., 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, The Mirage Casino-Hotel d/b/a The Mirage, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Union of Operating Engineers Local 501, AFL-CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time surveillance techs at the Employer's facility; excluding all other employees, including office, clerical, professional, guards, and supervisors as defined in the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

THE MIRAGE CASINO-HOTEL

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ered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 12, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Operating Engineers Local 501, AFL-CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time surveillance techs at our facility; excluding all other employees, including office, clerical, professional, guards, and supervisors as defined in the National Labor Relations Act.

THE MIRAGE CASINO-HOTEL D/B/A THE MIRAGE

The Board's decision can be found at www.nlrb.gov/case/28-CA-170874 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

